

U.S. COURTS
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CAMERON S. BURKE,
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHRIS J. DENNISON,

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY,
an Illinois corporation; CNA GROUP LIFE
ASSURANCE COMPANY, a wholly owned
subsidiary of Continental Casualty Company,
and RURAL TELEPHONE COMPANY, an
Idaho corporation,

Defendants.

Case No. CV 02-507-S-LMB

ORDER

Currently pending before the Court are Defendant CNA Group Life Assurance Company's Motion for Protective Order (Docket No. 33), Defendant CNA Group Life Assurance Company's Motion *in Limine* (Docket No. 35), Plaintiff Chris J. Dennison's Motion to Compel (Docket No. 38), and Defendant Rural Telephone Company's Motion for Protective Order and Motion *in Limine* (Docket No. 42). Having carefully reviewed the record, considered oral arguments, and otherwise being fully advised, the Court enters the following Order.

ORDER-1-

I.

BACKGROUND

Chris J. Dennison ("Plaintiff") was employed as a controller at Rural Telephone Company ("RTC"). In such capacity, Plaintiff was an eligible participant in RTC's Group Long-term Disability Insurance Plan ("Plan"). Plaintiff alleges that said Plan was underwritten by Defendant Continental Casualty Company ("Continental"), and serviced by its wholly-owned subsidiary, Defendant CNA Group Life Assurance Company ("CNA").¹

According to the record, from April 1998 through April 1999, Plaintiff underwent five back surgeries to treat back and neck pain. In this action, Plaintiff claims that he is totally disabled as a result of failed back syndrome and other ongoing medical problems.

On February 7, 2002, Plaintiff filed a claim for disability benefits under the Plan. Attached to his claim was the report from his treating physician, Dr. Tyler Frizzel, that Plaintiff was disabled. On March 8, 2002, Plaintiff received notice that effective March 6, 2002, his employment with RTC had been terminated. Despite this notification, Plaintiff alleges that on March 12, 2002, RTC represented to CNA that he was still employed with RTC, and that RTC would make reasonable accommodations to facilitate his physical handicap.

On March 15, 2002, CNA notified Plaintiff that his claim for disability benefits was denied. From May 2, 2002 through June 10, 2002, Plaintiff appealed CNA's denial of disability benefits by both submitting additional medical documentation verifying his condition, and by informing CNA that RTC had provided CNA with incomplete and inaccurate information.

¹RTC has admitted that it is the Plan administrator for the policy affecting Plaintiff. *Answer* (Docket No. 10). CNA admits that it is a wholly-owned subsidiary of Continental, but claims it is without sufficient information, and therefore denies that the Plan is underwritten by Continental and serviced by CNA. *Answer* (Docket No. 8).

On June 24, 2002, CNA's Appeals Committee notified Plaintiff that his claim for disability benefits was again denied. Plaintiff then filed the instant action on October 30, 2002, alleging breach of contract by Continental and CNA, and breach of fiduciary duty by RTC and CNA.

II.

DISCOVERY MOTIONS

On January 23, 2003, the Court entered a Scheduling Order setting the instant action for trial on March 10, 2004. *Scheduling Order* (Docket No. 18). The Court also set a discovery deadline of October 3, 2003, and a dispositive motion deadline of October 31, 2003. *Id.*

Plaintiff seeks to take the depositions of Michael Richmond (general manager of RTC), Doris Gloss, Brian Barnum, Tabitha Kirke, and Nancy Deskins (all individuals identified both in the administrative record, and by CNA, as responsible for CNA's review and denial of Plaintiff's claim for disability benefits). Defendants CNA, Continental, and RTC have requested orders from the Court precluding Plaintiff from deposing said individuals and precluding the introduction of evidence not contained within the administrative record. Plaintiff moves to compel the depositions of said individuals to determine the procedures involved in the claim process. To lessen any burden and expense, Plaintiff agreed, during oral arguments, to conduct said depositions via telephone provided that certain CNA written documents were disclosed and made available to Plaintiff prior to the depositions.

A. CNA's Motion for Protective Order (Docket No. 33)

On September 29, 2003, CNA filed a motion requesting "an order precluding Plaintiff from taking depositions" because "any discovery beyond [the] record is not relevant and results in unjustified cost, burden and expense." *Motion for Protective Order*, pp. 1-2.

In support of its Motion for Protective Order, CNA argues that the Plan extends discretionary authority to CNA, citing to the Plan document itself which states that "the Administrator and other Plan fiduciaries have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to benefits in accordance with the Plan." *Affidavit/Certification of Doris Gloss*, Ex. B (Docket No. 31). CNA's discretionary authority is important because Ninth Circuit case law makes it clear that, "[w]here the plan vests the administrator with discretionary authority to determine eligibility for benefits, [] a district court may review the administrator's determinations only for an abuse of discretion." *Taft v. Equitable Life Assurance Society*, 9 F.3d 1469, 1471 (9th Cir. 1994); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). More importantly, the Ninth Circuit Court of Appeals has held that "the abuse of discretion standard permits the district court to 'review only the evidence presented to the [plan] trustees.'" *Id.* (citing *Jones v. Laborers Health & Welfare Trust Fund*, 906 F.2d 480 (9th Cir. 1990)). CNA concludes, and thus argues, that because it has discretionary authority, evidence found outside the administrative record is not admissible, thus not relevant, and therefore not discoverable. *Motion for Protective Order* (Docket No. 33).

While the "abuse of discretion" standard, in its unaltered form, may not allow a court to consider evidence outside the administrative record when determining the merits of the instant action, the Court notes here that the "abuse of discretion" standard becomes less deferential when a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest. *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1144 (9th Cir. 2001). When operating under a conflict of interest, even the most careful and sensitive fiduciary "may unconsciously favor its profit interest over the interests of the plan, leaving

beneficiaries less protected than when the trustee acts without self-interest and solely for the benefit of the plan." *Doe v. Group Hosp. & Med. Servs.*, 3 F.3d 80, 86-87 (4th Cir. 1993).

According to the Ninth Circuit Court of Appeals, the highly deferential "abuse of discretion" standard is not appropriate for a self-interested administrator or fiduciary. *Regula*, 266 F.3d at 1144-1145.

The Ninth Circuit Court of Appeals has made it clear that "a plan will be viewed as operating under an apparent conflict when it is both funded and administered by the insurer." *Id.* at 1146. Plaintiff alleges here that CNA had a conflict of interest because it functioned both as the *de facto* Plan administrator and the funding source of benefits. *Memorandum in Opposition*, pp. 6-7 (Docket No. 39). Plaintiff argues that as the *de facto* plan administrator, CNA controlled the entire claim process. *Memorandum in Support of Motion to Compel*, p. 3 (Docket No. 43). Plaintiff argues in support of its position that CNA processed Plaintiff's claim, determined whether Plaintiff was eligible, and ultimately denied Plaintiff's claim for benefits. *Id.* Additionally, Plaintiff asserts that "the only record of [RTC] participating in the claim process is by way of providing Defendant CNA with false and misleading information. . . ." *Id.* at 4. While the Court makes no determination as to whether or not CNA was the *de facto* plan administrator as alleged by Plaintiff, or that RTC's role was so limited, the Court notes that a legitimate question exists as to CNA's role in connection with that of the plan administrator, and thus the potential for a conflict of interest exists. Accordingly, the Court concludes discovery should be allowed to clarify that issue.

As noted above, whether or not CNA operated under a conflict of interest in processing this claim is critical because it affects the appropriate standard of review that will be used in

determining the merits of the instant action.² Plaintiff simply seeks relief from traditional ERISA guidelines to investigate whether such a conflict exists through deposing those individuals involved in denying Plaintiff's disability benefits, and the Ninth Circuit Court of Appeals' decision in *Regula* permits such limited discovery. The Ninth Circuit resolved that issue when it held "[w]hen examining the evidence for a conflict of interest, the district court is not limited to the administrative record before the plan administrator at the time that the benefits determination was made." *Regula*, 266 F.3d at 1147 (citing *Tremain v. Bell Industries, Inc.*, 196 F.3d 970, 977 (9th Cir. 1999)).

In a similar case before this Court, plaintiffs alleged that its plan administrator had a conflict of interest which affected the appropriate standard of review to be employed by the Court. *Casper v. Idaho Fresh Pak, Inc.*, District of Idaho Case No. CV00-349-E-MHW. The defendants in that case disputed that any conflict of interest existed. *See Order*, Docket No. 49, p. 8. Plaintiffs, although not having actually presented any evidence as to an actual conflict, sought to engage in limited discovery to explore whether such evidence existed, and its possibly disparate impact. *Id.* at 9. The Court noted that in order to determine the proper standard of review to be applied, the issue of apparent conflict of interest had to be resolved. *Id.* at 8.

The *Regula* decision appears to mandate that the Court is required to allow the Plaintiffs to present additional evidence, including evidence from outside the administrative record, in order to determine the effect of the apparent conflict of interest.

* * *

²If Plaintiff can provide probative evidence of a conflict, it will create a rebuttable presumption that CNA's decision was in fact a dereliction of its fiduciary responsibilities. *Regula*, 266 F.3d at 1145. CNA would then bear the burden of rebutting the presumption by producing evidence showing that the alleged conflict of interest did not affect its decision to deny benefits. *Id.* If CNA failed to carry its burden, the Court would then review under a *de novo* standard, not an "abuse of discretion" standard, CNA's decision to deny benefits. *Id.*

[T]he Court is compelled by the decision in *Regula* to allow Plaintiffs to conduct a limited amount of discovery for the purpose of inquiring into the areas stated at the hearing, such as what did the plan administrators know and when did they know it.

Id. at 11.

In harmony with both the Ninth Circuit's *Regula* decision, as well as the *Casper* decision from this District, and to facilitate the Court's full exercise of informed and independent judgment, the Court will allow Plaintiff to discover evidence, including evidence outside the administrative record, if it may help to determine the existence and effect of an alleged conflict of interest in CNA processing Plaintiff's claim. Whether or not a conflict of interest exists in this action will ultimately determine the appropriate standard of review to be used in deciding the merits of the instant action. Accordingly, the Court will allow Plaintiff the latitude necessary to determine whether or not such a conflict existed at the time Plaintiff's disability benefits were processed and ultimately denied.

B. CNA's First Motion *in Limine* (Docket No. 35)

CNA requests the Court enter "an order limiting evidence at trial to the administrative record already before the Court." *First Motion in Limine*, pp. 1-2. In the Court's view, a ruling on CNA's First Motion *in Limine* is premature at this time and is more appropriately determined as an evidentiary matter during the course of trial. Hence, CNA's First Motion *in Limine* is deferred, and will be denied at this time without prejudice. CNA may raise this issue again after completion of the depositions simply by filing a request for renewal without filing a new motion.

C. Plaintiff's Motion to Compel (Docket No. 38)

Consistent with the aforementioned law and analysis, Plaintiff's Motion to Compel is GRANTED and Defendants should make available for telephonic deposition: Doris Gloss, Brian

Barnum, Tabitha Kirke, Nancy Deskins, and Michael Richmond.

D. RTC's Motion for Protective Order and Motion *in Limine* (Docket No. 42)

In accordance with the conclusions stated above, RTC's Motion for Protective Order and Motion *in Limine* is DENIED.

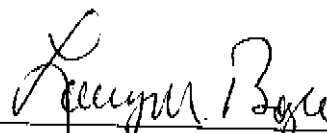
III.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. CNA's Motion for Protective Order (Docket No. 33) is DENIED.
2. CNA's Motion *in Limine* (Docket No. 35) is DENIED without prejudice.
3. Plaintiff's Motion to Compel (Docket No. 38) is GRANTED and Defendants should make available for telephonic deposition: Michael Richmond, Doris Gloss, Brian Barnum, Tabitha Kirke, and Nancy Deskins. To facilitate telephonic depositions, CNA is to disclose and deliver to Plaintiff true and complete copies of all relevant and pertinent written procedures used by CNA in processing this and similar claims for disability benefits.
4. RTC's Motion for Protective Order and Motion *in Limine* (Docket No. 42) is denied as follows: RTC's Motion for Protective Order is denied, and RTC's Motion *in Limine* is denied without prejudice.

SO ORDERED this 9th day of January, 2004.



LARRY M. BOYLE
CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Idaho
January 12, 2004

WM

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:02-cv-00507

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

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Cameron S. Burke, Clerk

Date: 1-12-04

BY: WM
(Deputy Clerk)